

THE FCC HAS AUTHORITY TO REGULATE THE RETRANSMISSION OF DIGITAL BROADCAST VIDEO CONTENT

1. The FCC has broad authority under Section 336 of the Act to take actions it deems appropriate to advance the public interest in the rapid deployment of digital broadcast television.

- Subsections 336(b)(4) and (5) authorize the FCC to adopt regulations “as may be necessary” to maintain signal quality, hours of service and “the protection of the public interest, convenience and necessity.”
 - These subsections -- and, in particular, the FCC’s mandate to regulate in the public interest -- do not pertain only to the provision of ancillary or supplementary services, but to the implementation of a digital broadcast television service generally.
 - Particularly given the nascent stage of digital broadcasting in 1996, Congress understood and intended that the provisions of Section 336 would authorize the adoption of whatever rules were necessary for the digital rollout, including rules providing for digital redistribution protection.

The FCC has relied on the broad grant of authority embodied in Section 336 to adopt a variety of rules governing the digital transition, including political broadcasting and children’s programming requirements.

2. The adoption of a broadcast flag requirement would be reasonably ancillary to the FCC’s jurisdiction under Titles I and III of the Act.

- The likelihood that unauthorized redistribution of digital content will have an adverse impact on the quality and level of service provided by digital broadcast television stations is comparable to the harm the FCC identified in the *Southwestern Cable* case and is a sufficiently important governmental interest to justify the assertion of jurisdiction.
 - In *Southwestern Cable*, the FCC acted to protect the integrity of local television stations from the harm posed by cable systems’ importation of identical content on distant stations.
 - The protection of high value content is essential to ensure that broadcast television stations are not disadvantaged vis-à-vis their MVPD competitors as a delivery platform for such content.

- The FCC repeatedly has asserted jurisdiction pursuant to its plenary authority over broadcasting in order to implement rules affecting the design, functionality and capability of consumer devices.
 - In addition to the broad authority conferred in Section 154(i), the FCC previously has relied on, among others, numerous Title III provisions to promulgate rules directly or indirectly affecting equipment manufacturers, *e.g.*, Sections 301 (licensing authority); 302 (minimum standards for home reception devices); 303(e) (external effects of apparatus); 303(f) (rules deemed necessary to carry out the purposes of the Act); 303(g) (facilitate the “larger and more effective use of radio in the public interest”); 303(r) (rules as may be necessary to carry out the purposes of the Act).

The FCC relied on its ancillary jurisdiction over broadcasting in adopting the Subpart W encoding rules in the “Plug and Play” proceeding, even in the face of the arguably limiting effect of Section 544, which authorized the adoption of “narrow technical standards” mandating “a minimum degree of common design and operation.”

- Neither the All Channel Receiver Act nor the *Electronic Industries Association* case limits the FCC’s discretion to exercise its ancillary jurisdiction with respect to the broadcast flag.
 - The court in the *EIA* case did not interpret the ACRA as embodying a Congressional intent to delimit the FCC’s authority to mandate consumer equipment capabilities when necessary; rather, the court objected to the imposition of requirements that exceeded currently available technology.